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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MAXIMILIAN KLEIN, *et al.*,

Plaintiffs,

vs.

META PLATFORMS, INC.,

Defendant.

Consolidated Case No. 3:20-cv-08570-JD

**ADVERTISER PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO EXCLUDE OPINIONS OF
DR. HOCHBERG**

Hearing Date: December 14, 2023
Hearing Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: The Honorable James Donato

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FILED UNDER SEAL**MEMORANDUM OF POINTS AND AUTHORITIES**

Meta's¹ opposition (ECF No. 677-1; hereinafter, "Opposition" or "Opp.") confirms that the Court should act in its discretion as gatekeeper to exclude the unqualified, unreliable, irrelevant, and misleading opinions of Dr. Hochberg.

ARGUMENT

I. DR. HOCHBERG'S FALSE CLAIM THAT FIRMS WITH MONOPOLY POWER HAVE NECESSARILY ENGAGED IN ANTICOMPETITIVE CONDUCT DEMONSTRATES HER LACK OF QUALIFICATIONS AND RENDERS SECTION III OF HER REPORT AND THE OPINIONS EXPRESSED THEREIN UNRELIABLE

Dr. Hochberg misunderstands monopoly power, which is a basic concept in antitrust economics. This fundamental error alone should raise questions about Dr. Hochberg's qualifications. A review of those qualifications reveals that she is not a trained economist, nor does she have any training, coursework, or professional experience specific to monopoly power (or antitrust damages). Because monopoly power is so central to Dr. Hochberg's opinions, her definitional error requires at least Section III of her report to be excluded.

A. Dr. Hochberg Failed to Understand that Monopoly Power and Anticompetitive Conduct Are Not the Same Thing

As this Court is aware, in antitrust law, the possession of the power to influence prices in a given market and the acquisition of that power by anticompetitive means or use of that power for anticompetitive purposes are distinct concepts. *E.g., In re Google Play Store Antitrust Litig.*, No. 21-md-02981-JD, 2022 WL 17252587, at *8 (N.D. Cal. Nov. 28, 2022) (Donato, J.) (listing "possession of monopoly power in the relevant market" and "the willful acquisition or maintenance of that power" as separate elements of Section 2 claim). The same is true for antitrust economics. *See* Declaration of Amanda F. Lawrence in Support of Advertiser Plaintiffs' Motion to Exclude Opinions of Dr. Hochberg (ECF No. 657-2, the "Mot. Decl."), Ex. 9, ¶134 (quoting commonly used textbook for definition of monopoly power: "It is common practice to say that

¹ Unless otherwise indicated, capitalized terms have the meanings defined in Advertisers' opening brief. ECF No. 657-1 ("Mot."). Additionally, unless otherwise indicated, emphases are added, and citations are omitted.

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1 whenever a firm can profitably set its price above its marginal cost without making a loss, it has
 2 monopoly power or market power.”); *id.*, ¶135 (quoting same textbook for distinction between
 3 monopoly power and anticompetitive conduct: “It is a common mistake to think that the antitrust
 4 laws prohibit monopoly. They do not; however, they do prohibit certain actions that could allow a
 5 firm to acquire or maintain monopoly power.”).

6 Dr. Hochberg clearly conflates these two distinct concepts. She notes:

7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]

13 Mot. Decl., Ex. 1, ¶33. This critique of Advertisers’ experts’ methodology is both circular
 14 ([REDACTED])
 15 ([REDACTED]) and reveals Dr. Hochberg’s critical
 16 misunderstanding. Indeed, things such as [REDACTED]
 17 [REDACTED] are not factors completely unrelated to monopoly power. This is because a
 18 firm can obtain monopoly power through legitimate means, and Dr. Hochberg’s report repeatedly
 19 says [REDACTED].

20 Meta’s counsel attempts to rewrite Dr. Hochberg’s plainly stated opinion, protesting that she
 21 does *not* assume that in order for a firm to have monopoly power, it necessarily must have engaged
 22 in anticompetitive conduct. Opp. at 7. But Meta then proceeds to explicitly admit that she *does*
 23 make this assumption:

24 Hochberg showed in evaluating over 1,000 firms is that it is “not uncommon to see
 25 successful companies across many industries” – including several with profitability
 26 measures at or above the levels that Williams asserts are [REDACTED]
 [REDACTED] [Dr. Hochberg’s] analysis undermines the Kreitzman-Williams
 conclusion that Meta’s profitability demonstrates *unlawful* monopoly power.

27 *Id.* at 10. However, neither Mr. Kreitzman nor Dr. Williams offered the opinion that Meta’s EPR
 28 demonstrated its “unlawful monopoly power.” To the contrary, Dr. Williams offered the opinion

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1 that [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] Mot. Decl., Ex. 9, ¶142.

5 Dr. Williams, thus, [REDACTED]
 6 [REDACTED] Dr. Hochberg, however, does not make this distinction and thus
 7 makes a fundamental mistake: her plainly stated opinion is that [REDACTED]
 8 [REDACTED]

9 In fact, Meta admits this is true and that Dr. Hochberg's opinion is that [REDACTED]

10 [REDACTED] stating:

11 That 17 firms in Hochberg's analysis had an EPR or ROCE-WACC of [REDACTED]% or that
 12 14 firms had ROCE-WACC of [REDACTED]% during the class period is consistent with
 13 Hochberg's opinion, not Kreitzman's and Williams's, that Meta's profitability level
 does not [provide] evidence [of] *unlawful* monopoly – not unless all 17 of those
 firms are *unlawful* monopolists too.

14 Opp. at 10. As Meta states at the bottom, Dr. Hochberg's opinion is that “profitability alone evinces
 15 nothing about *unlawful* monopoly power at all.” *Id.* at 7. This opinion is tainted by her fundamental
 16 misunderstanding of monopoly power, and like the remainder of Dr. Hochberg's opinions, should
 17 be excluded.

18 **B. Dr. Hochberg Is Not Qualified**

19 Dr. Hochberg's error about the meaning of a basic concept so critical to her opinion flatly
 20 reveals that she is simply not qualified to be an expert here. In order to get around this, Meta
 21 suggests that Dr. Hochberg is qualified because she “specifically researches and teaches about firm
 22 entry, competition, and innovation” as an expert on “entrepreneurship.” Opp. at 5-6. However, as
 23 Advertisers note in the Motion, [REDACTED]

24 [REDACTED] Mot. at 6 ([REDACTED])
 25 [REDACTED]
 26 [REDACTED]). This is

27 enough to exclude Dr. Hochberg's opinions. *See, e.g., Kleen Prods. LLC v. Int'l Paper*, No. 10 C
 28 5711, 2017 WL 2362567, at *24 (N.D. Ill. May 31, 2017) (excluding testimony of rebuttal expert

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1 who admitted at deposition that he “is not an antitrust expert”). Meta’s attempt to stretch the field
 2 of entrepreneurship to cover [REDACTED] is thus facially implausible.

3 **C. Dr. Hochberg’s Misunderstanding of Monopoly Power Permeates Her Entire**
 4 **Report**

5 Far from Plaintiffs “nitpicking” Dr. Hochberg’s word choice as to a tangential topic,
 6 monopoly power (specifically Advertisers’ experts’ methodology for determining whether Meta had
 7 monopoly power) is *critical* to all three of Dr. Hochberg’s principal opinions in her report:²

- 8 • [REDACTED]
 9 [REDACTED]
 10 Mot. Decl., Ex. 1, ¶2;
- 11 • [REDACTED]
 12 [REDACTED] *Id.*, ¶3; and
- 13 • [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED] *Id.*, ¶4.

17 In fact, Dr. Hochberg’s [REDACTED]
 18 [REDACTED]
 19 [REDACTED] *See, e.g., id.*, ¶36 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

23 [REDACTED] Mot. Decl., Ex. 9, ¶137. All three opinions include the incorrect assumption or belief
 24 that [REDACTED]
 25
 26

27 ² [REDACTED]
 28 [REDACTED] *See*
 Section III, below.

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1 [REDACTED] See
2 Mot. at 9 n.11. All three must, therefore, be excluded.

3 **II. DR. HOCHBERG'S EMPIRICAL ANALYSIS OF OTHER FIRMS' ECONOMIC**
4 **PROFITABILITY IS JUNK SCIENCE**

5 As explained in Advertisers' opening brief, Dr. Williams draws direct evidence of Meta's
6 monopoly power from, among other things, three distinct empirical observations: [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED] Mot. at 10-11. [REDACTED]

11 [REDACTED] Mot. Decl., Ex. 1, ¶¶38-39. Instead,

12 [REDACTED]
13 [REDACTED] See Mot.

14 Decl., Ex. 9, ¶147, Figure 4 & ¶153, Figure 7. [REDACTED]

15 [REDACTED] (*id.*, ¶151, Figure 6):

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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1 Unable to diminish the significance of this data through valid statistical inference, Dr.
 2 Hochberg (and Meta's Opposition) move the goalposts, attacking opinions that Dr. Williams and Mr.
 3 Kreitzman never gave. These attacks are unhelpful to the factfinder and warrant exclusion.

4 **First**, Dr. Hochberg is clearly unqualified to provide opinions regarding economic profits.
 5 Dr. Hochberg testified that [REDACTED]

6 [REDACTED]
 7 [REDACTED] Mot. Decl., Ex. 2 at 60. Dr. Hochberg
 8 is wrong. As correctly stated in a well-known textbook by experts from McKinsey & Company, the
 9 correct definition of economic profits is as follows:

10 Economic Profit = Invested Capital × (ROIC – Cost of Capital).

11 In other words, economic profit is the spread between the return on invested capital ("ROIC")
 12 and the cost of capital times the amount of invested capital.³

13 Dr. Hochberg's definition is not just wrong – it is nonsensical. A critical aspect of calculating
 14 a firm's economic profits is to subtract the opportuning cost of capital (*i.e.*, Invested Capital × Cost
 15 of Capital) from the firm's ROIC. Ex. 1 at 17. Dr. Hochberg's unique definition [REDACTED]. The
 16 fact that she was incapable of correctly defining the elementary but critical concept of economic
 17 profits demonstrates that she is unqualified to offer opinions on the work of Mr. Kreitzman and Dr.
 18 Williams that uses and relies on the correct definition of economic profits.

19 **Second**, Dr. Hochberg contends that [REDACTED]

20 [REDACTED]
 21 [REDACTED]. Mot. Decl., Ex. 1, ¶37. But this is irrelevant;
 22 [REDACTED]
 23 [REDACTED]

24 [REDACTED]. *Id.*, ¶38, Figure 1.
 25
 26

27 ³ Tim Koller, et al., *Valuation: Measuring and Managing the Value of Companies* (7th ed.
 28 2020) at 41 (attached as Exhibit 1 to the Declaration of Amanda F. Lawrence in Support of
 Advertiser Plaintiffs' Reply Memorandum, filed concurrently herewith).

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1 *Third*, Dr. Hochberg and Meta argue the inference of monopoly power as to Meta fails unless
 2 Advertisers prove “all 17 of those firms . . . are unlawful monopolists too.” Opp. at 10; Mot. Decl.,
 3 Ex. 1, ¶40. Again, Dr. Hochberg, and apparently Meta, fail to appreciate the difference between
 4 monopoly power and unlawful monopolization. Mot. Decl., Ex. 9, ¶157.

5 As for Dr. Hochberg’s yardstick damages analyses (Tables 3, 4, and 5), Meta’s sole opposition
 6 is that Advertisers’ “criticisms do not make sense” because Dr. Hochberg “is not positing an
 7 alternative yardstick model” and is instead mirroring the supposed “conceptual problems” with
 8 Williams’ and Kreitzman’s approach. Opp. at 11. But as explained in Advertisers’ opening brief,
 9 Dr. Hochberg *specifically did not* follow Williams’ and Kreitzman’s methodology. Mot. at 12.
 10 Rather, she [REDACTED]

11 [REDACTED]
 12 Furthermore, Meta states that “Advertisers criticize Hochberg for supposedly ‘cherry
 13 picking’ data from [REDACTED] to show that persistently positive EPRs and ROCE in
 14 excess of WACC are common. But Hochberg identified over 1,000 firms with such characteristics.”
 15 Opp. at 10. Again, this is nonsense. Plaintiffs did not criticize Hochberg for cherry picking firms
 16 with *positive* EPRs. [REDACTED]

17 [REDACTED]
 18 [REDACTED] Mot. at 11.⁴

19 **II. SECTIONS V AND VI OF DR. HOCHBERG’S REPORT ARE NOT EXPERT**
 20 **OPINIONS**

21 As Advertisers previously observed, “[s]omething doesn’t become ‘scientific knowledge’ just
 22 because it’s uttered by a scientist; nor can an expert’s self-serving assertion that his conclusions were
 23 ‘derived by the scientific method’ be deemed conclusive” to justify the admissibility of specific
 24 purported expert testimony. Mot. at 4 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311,

25 _____
 26 ⁴ In a footnote, Meta states: “Advertisers also briefly suggest that Hochberg’s EPR calculations
 27 contain supposed errors concerning minutiae such as the accounting treatment of ‘inventory’ in the
 28 Homebuilding industry.” Opp. at 11 n.5. Meta is wrong – far from being “minutiae,” Dr. Hochberg’s
 inability to understand and implement the EPR methodology is proven by her mistakes in calculating
 EPRs. Dr. Hochberg’s mistakes demonstrate that “Dr. Hochberg failed in her attempt to use my
 methodology for calculating EPRs.” Mot. Decl., Ex. 8, ¶11.

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1 1315-16 (9th Cir. 1995)). Accordingly, an “expert’s bald assurance of validity is not enough. Rather,
 2 the party presenting the expert must show that the expert’s findings are based on sound science, and
 3 this will require some objective, independent validation of the expert’s methodology.” *Daubert*, 43
 4 F.3d at 1316. That is because the presentation of an expert witness inherently risks the likelihood
 5 that the testimony will ““carry special weight with the jury,”” especially when faulty opinions are
 6 submitted under the “misleading façade of expertise.” *Waymo LLC v. Uber Techs., Inc.*, No. C 17-
 7 00939 WHA, 2017 WL 5148390, at *5 (N.D. Cal. Nov. 6, 2017).

8 Thus, the Court should exclude an expert that “does not offer any specialized or scientific
 9 expertise, or anything beyond the typical knowledge and experience of a jury.” *DZ Rsrv. v. Meta*
 10 *Platforms, Inc.*, No. 3:18-CV-04978-JD, 2022 WL 912890, at *9 (N.D. Cal. Mar. 29, 2022) (Donato,
 11 J.). And as Meta has argued to this Court in other contexts,⁵ basic multiplication and arithmetic are
 12 well within the ability of the typical juror. *See DZ Rsrv.*, 2022 WL 912890, at *9 (excluding expert
 13 that “used a price premium figure that he did not calculate, and merely applied it in an obvious fashion
 14 to the amount of money plaintiffs are said to have spent on advertising”); *Schwartz v. Fortune Mag.*,
 15 193 F.R.D. 144, 147 (S.D.N.Y. 2000) (rejecting accountant’s testimony that “was not based on any
 16 specialized knowledge, but rather involved basic calculations”); *Waymo LLC*, 2017 WL 5148390, at
 17 *5 (“Wagner simply adopted the opinions of others and performed grade-school arithmetic counsel
 18 can do on an easel. Where is any specialized knowledge? There is none.”).

19 The opinions contained in Sections V and VI of Dr. Hochberg’s report fit squarely into this
 20 category of inadmissible lay testimony. Devoid of reference to the factual record or academic
 21 literature, Dr. Hochberg makes no attempt to ground the reliability of her conclusions in the facts of
 22 the case or the relevant scholarly principles. Rather, at deposition, [REDACTED]

23 [REDACTED]
 24 [REDACTED] (Mot. Decl., Ex. 1, ¶63) – [REDACTED]
 25 [REDACTED]

26
 27 ⁵ *DZ Rsrv. v. Meta Platforms, Inc.*, No. 3:18-CV-04978-JD, ECF No. 373 (N.D. Cal. Mar. 4,
 28 2022), at 3-5 (arguing “The Factfinder Does Not Need [Proffered Expert] To Do Basic
 Multiplication” and collecting authorities).

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1 Mot. Decl., Ex. 2 at 117:11. Any juror can observe that Advertisers do in fact seek [REDACTED] for
2 their monopoly maintenance damages. Contrary to Meta's contention that Advertisers have somehow
3 conceded that they fail class certification (Opp. at 12), the Court should not permit Dr. Hochberg to
4 dress this observation (to the extent it carries any probative value) in the conclusive veneer of [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]. Mot. Decl., Ex. 2 at 117:8-9, 117:23-24, 118:5-8.

8 Similarly, Dr. Hochberg's revised EPR calculations in Section VI are precisely the
9 "misleading façade of expertise" courts regularly exclude under the *Daubert* standard. *See Waymo*
10 *LLC*, 2017 WL 5148390, at *5. By her own admission, Dr. Hochberg [REDACTED]

11 [REDACTED]
12 [REDACTED] Mot. Decl., Ex. 2 at 119:2-120:22, 122:5-
13 123:25. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 *Id.* at 121:8-123:25; *see also* Mot. at 13 n.14. Rather, Dr. Hochberg [REDACTED]
19 [REDACTED]. Mot. Decl., Ex. 2 at
20 121:8-123:25. However, that Meta requested Dr. Hochberg to consider only how Consumers'
21 damages claim (presumably for the sole reason that Consumers are consolidated with Advertisers in
22 this case) would impact costs (and nothing else) merely demonstrates that her opinion is "nothing
23 more than uncritical acceptance of other evidence in the case, which can speak for itself, plus some
24 basic arithmetic." *Waymo LLC*, 2017 WL 5148390, at *6.

CONCLUSION

25
26 For the foregoing reasons, the Court should exclude the testimony of Dr. Hochberg as
27 unqualified. To the extent the Court determines Dr. Hochberg is qualified as an expert in monopoly
28

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power and antitrust damages, it should exclude the opinions expressed in Sections III, V, and VI of her report on the grounds set forth herein.

Dated: November 3, 2023

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FILER ATTESTATION

I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: November 3, 2023

By: /s/Amanda F. Lawrence
Amanda F. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I caused a true and correct copy of the foregoing document to be served by electronic mail on all counsel of record.

Dated: November 3, 2023

By: /s/Amanda F. Lawrence
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